UNITED NATIONS

AT

Administrative Tribunal

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6 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 634

Case No. 685: HORLACHER

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, on 14 August 1992, David E. Horlacher, a former staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"...

(a) To rescind the decision of the Secretary-General ... dated 26 May 1992, rejecting the Applicant's request for reimbursement of income taxes imposed by authorities of the United States that will be levied on the lump sum withdrawal benefit received from the United Nations Joint Staff Pension Fund;

(b) To order the Secretary-General to reimburse the Applicant for payment of the income taxes actually paid on the lump sum withdrawal from the United Nations Joint Staff Pension Fund...;

(c) To order the Secretary-General to reimburse the Applicant for all fees, costs and disbursements in the preparation and presentation of the case, ...;

(d) To order the Secretary-General to reimburse the Applicant for interest on the amount to be reimbursed...;

(e) To fix the appropriate amount of compensation payable to the Applicant for the injury sustained by him in case the Secretary-General should decide in the interest of

the United Nations that the Applicant should be compensated without further action being taken in this case."

Whereas the Respondent filed his answer on 31 August 1993;

Whereas the Applicant filed written observations on 20 December 1993;

Whereas the facts in the case are as follows:

The Applicant, a national of the United States of America, entered the service of the United Nations on 1 December 1974, on a three-month short term appointment at the L-4, step VI level, under the 200 Series of the Staff Rules. The appointment was extended for an additional fifteen months, through 31 May 1976, making the Applicant a participant in the United Nations Joint Staff Pension Fund (the Pension Fund). The Applicant separated from the service of the United Nations on 31 May 1976. Between 31 May 1976 and 30 September 1979, the Applicant was a consultant to the United Nations and as such, was not entitled to participation in the Pension Fund.

On 21 April 1980, the Applicant received a two-year fixed term appointment as a staff member at the P-5, step 1 level, thereby again becoming a participant in the Pension Fund. He thereupon exercised his right to restore his prior contributory service from 1 March 1975 through 31 May 1976, in accordance with the provisions of article 24 of the Regulations of the Pension Fund, then in force.

The Applicant's appointment was extended, successively, through 20 April 1987, 31 August 1991 and 31 January 1992, when he separated from the Organization.

The General Assembly, in its resolution 34/165, decided "that any staff member joining the United Nations Secretariat on or after 1 January 1980 shall not be entitled to receive reimbursement from the Tax Equalization Fund or otherwise for national income taxes paid on lump sum pension payments received from the United Nations

Joint Staff Pension Fund; this decision will not affect staff members serving with the United Nations prior to 1 January 1980."

In a memorandum dated 29 May 1990, the Applicant asked for a ruling from the Office of Programme Planning, Budget and Finance on whether he was eligible for reimbursement of United States income taxes in respect of any lump-sum pension payment he might receive upon retirement from the United Nations. The Applicant referred to the "Guide to National Taxation of UNJSPF Benefits with Special Reference to the United States Tax".

On 20 May 1991, the Chief, Income Tax Sub-Unit, Accounts Division, transmitted to the Applicant a copy of a memorandum dated 26 April 1991, from the General Legal Division, Office of Legal Affairs, advising that the Applicant was "not eligible to be reimbursed U.S. income taxes paid in respect of any lump sum payment he might receive from the Pension Fund" on the ground that when the Applicant was appointed on 21 April 1980, he was not reinstated but was given a "new" appointment within the meaning of staff rule 104.3(a). The terms of the Applicant's "new" appointment governed the question of his eligibility for reimbursement of taxes paid in respect of his lump-sum retirement benefit. Under the terms of the Applicant's new appointment, income taxes paid by him on the lump-sum retirement benefit could no longer be reimbursed, as the General Assembly, in its resolution 34/165, had prohibited such reimbursement to any staff member who joined the Organization after 1 January 1980.

On 14 June 1991, the Applicant requested the Secretary-General to review the decision and on 13 August 1991, he lodged an appeal with the Joint Appeals Board (JAB).

In a memorandum dated 20 November 1991, the Representative of the Secretary-General informed the Secretary of the JAB that on the basis of a memorandum of 13 August 1991, from the Director of the General Legal Division, the Organization was prepared "to reimburse the appellant for taxes paid on the pro-rated lump sum portion of his pension benefits as it pertains to his service with the United

Nations prior to 1 January 1980", but not for the portion attributed to his employment after 1 January 1980.

On 21 November 1991, the Secretary of the JAB informed the Applicant of that decision.

On 28 January 1992, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 11 February 1992. Its considerations and recommendation read, in part, as follows:

"Considerations

12. The Panel noted that ... the heart of the matter before it (...) is the application of the paragraph in Part III of General Assembly resolution 34/165 (...), ... Having carefully examined the resolution, the Panel acknowledged that its text was ambiguous.

13. ...

14. Although the Panel had agreed from the outset that it should base its decision on its understanding of the text of the resolution, and not on a reading (or interpretation) of what the drafters had intended to say, it did explore the avenue proposed in the memorandum of 13 August 1991, from the Director, General Legal Division, of legislative history and intent. ... The Panel noted that if it was the intent of the General Assembly to end reimbursement for staff members appointed after 1 January 1980, that was accomplished by the first clause of part III of the resolution. Given the legislative history which included notably the various Tribunal judgements dealing with acquired rights, there was no need to specify that those appointed prior to 1 January 1980 and in continuous service at and after that date maintained their entitlement. If the second clause had any operative content, it was precisely with respect to such staff members as Appellant.

15. Finally, it considered the submission of Respondent (...) that Appellant is not entitled to reimbursement because the cited General Assembly resolution is 'part of his terms of employment.' Clearly, the second clause of part III of the resolution is just as much part of his terms of employment as is the first. And if the second clause applies to Appellant, then the first is immaterial.

16. The Panel concludes, therefore, that Appellant, who was serving with the United Nations prior to 1 January 1980, is entitled to receive reimbursement for national income taxes paid on any lump sum payment he may receive from the United

Nations Joint Staff Pension Fund. In arriving at this conclusion, the Panel was also guided by the principle that, as the drafter of any text is responsible for its clarity, any ambiguity must be interpreted in favour of the other party.

Recommendation

17. The Panel recommends that the Secretary-General confirm that Appellant is entitled to receive reimbursement for national income taxes paid on any lump sum payment he may receive from the United Nations Joint Staff Pension Fund."

On 26 May 1992, the Assistant Secretary-General for Human Resources Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's conclusion that you are entitled to receive reimbursement of national income taxes paid on any lump sum payment you may receive from the United Nations Joint Staff Pension Fund. However, bearing in mind that:

(a) General Assembly resolution 34/165 of 17 December 1979, decided that any staff member joining the United Nations Secretariat on or after 1 January 1980, shall not be entitled to receive reimbursement from the Tax Equalization Fund or otherwise for national income taxes paid on lump sum pension payments received from the United Nations Joint Staff Pension Fund, and that this decision will not affect staff members serving with the United Nations prior to 1 January 1980;

(b) after separating from service on 31 May 1976, you received a second appointment on 21 April 1980;

(c) your second appointment was a new appointment within the meaning of staff rule 104.3(a), its terms being fully applicable without regard to any period of former service;

(d) it would be an unwarranted reading of the resolution to interpret it as preserving for all time in the future the right to reimbursement of income taxes on the entire amount of lump sum pension payments when the right to a substantial part of those payments did not exist before 1 January 1980, the Secretary-General cannot accept the recommendation made by the Board. He has decided that you should receive reimbursement for

> income taxes paid on the pro-rated lump sum portion of your pension benefits as it pertained to your service prior to 1 January 1980, but not for the portion pertaining to your service after 1 January 1980."

On 14 August 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant acquired the right to be exempt from the first clause of General Assembly resolution 34/165, Part III, by virtue of his 18 months of service, from 1 December 1974 through 31 May 1976.

2. The Applicant had a legitimate expectation to reimbursement of national income taxes on his lump-sum retirement benefit.

3. As the Applicant had acquired the right to tax reimbursement, the Respondent is obliged to reimburse him for the national income taxes on his entire lump-sum retirement benefit, and not just on that portion of the benefit which is attributable to his service prior to 1 January 1980.

Whereas the Respondent's principal contentions are:

1. Under the express wording of General Assembly resolution 34/165, Part III, the Applicant is not entitled to reimbursement for national income taxes payable on that portion of his lump-sum retirement benefit attributable to his service performed under an appointment he received after 1 January 1980.

2. The history of the enactment of resolution 34/165 clearly shows that the General Assembly intended to exempt from the prohibition on reimbursement of national income taxes only those staff members who had been in service prior to 1 January 1980, and remained so on that date.

3. The Applicant is entitled to reimbursement only for national income taxes for the portion of his lump-sum pension benefit attributable to his service until 31 May 1976. The

Administrative Tribunal has found no difficulty in ordering the pro-rating of such tax reimbursement in prior cases.

The Tribunal, having deliberated from 23 June to 6 July 1994, now pronounces the following judgement:

I. The Applicant seeks rescission of a decision by the Respondent dated 26 May 1992, rejecting the Applicant's request for reimbursement of income taxes imposed by the United States Government on the lump sum withdrawal benefit from the United Nations Joint Staff Pension Fund (the Pension Fund). The Tribunal is also asked to order the Respondent to reimburse the Applicant for those taxes actually paid by him, together with interest and costs. The decision appealed awarded the Applicant reimbursement only on the portion of such taxes paid on the lump sum withdrawal benefit allocable to service rendered prior to 1 January 1980. The basis for the decision is the Respondent's interpretation of General Assembly resolution 34/165 of 17 December 1979, which provides that:

> "... any staff member joining the United Nations Secretariat on or after 1 January 1980 shall not be entitled to receive reimbursement from the Tax Equalization Fund or otherwise for national income taxes paid on lump sum pension payments received from the United Nations Joint Staff Pension Fund; this decision will not affect staff members serving with the United Nations prior to 1 January 1980."

II. The Applicant had been a staff member of the Organization from 1 December 1974 until 31 May 1976, when he separated from service. He participated in the Pension Fund from 1 March 1975 until his separation. He later rejoined the Organization on 21 April 1980 and served for approximately 11 years until his retirement. He had restored his prior 1974-76 service under article 24 of the Pension Fund Regulations. Under staff rule 104.3(a), his 1980 appointment was not a reinstatement, but a new appointment.

III. The Applicant contends that, regardless of his having been newly appointed after 1 January 1980, the mere fact that he had been in the service of the Organization a few years prior to that date, entitles him to full reimbursement because staff members serving with the Organization prior to 1 January 1980 were, pursuant to the terms of the General Assembly resolution, to be unaffected by it. The Respondent disputes this interpretation. Thus, the issue before the Tribunal involves a determination of the meaning of the resolution.

IV. The Tribunal considers that the language of the last clause of the resolution, relied upon by the Applicant, is unclear. It might be construed either, (i) as providing for total or partial reimbursement to staff members in the service of the Organization prior to 1 January 1980 and continuing in its service thereafter; or (ii) as providing for total or partial reimbursement to staff members who were in the service of the Organization at any time prior to 1 January 1980, regardless of when or for how long and, who rejoined the Organization on or after 1 January 1980. Given the ambiguity in the pertinent language of the resolution, the Tribunal will examine its background and purpose to assist it in determining its intended meaning. Cf. Judgement No. 437, Ahmed (1988).

V. The Applicant advances what he describes as three major contentions in support of his claim to entitlement to reimbursement for all United States income taxes paid by him on the lump sum pension benefit he received from the Pension Fund. His first contention is that, by entering the service of the Organization on 1 December 1974, he acquired the right to be exempt from the first clause of General Assembly resolution 34/165. His second contention is that, having acquired the right to be exempt from the first clause, he had a legitimate expectation of tax reimbursement. His third major contention is that, by his having acquired the above-mentioned right and the above-mentioned legitimate expectation, the Organization, in turn, became obliged to reimburse the full amount

of the income taxes following his reemployment by the Organization and the restoration of his prior contributory service. His contentions are variously based on his letter of appointment, General Assembly resolution 34/165, Judgement No. 320, Mills (1983), Judgement No. 373, Saddler (1986), Judgement No. 237, Powell (1979), a 1974 staff information circular, a 1979 Secretary-General's Bulletin, and article 28 of the Pension Fund Regulations.

VI. With respect to the Applicant's first contention, there is no doubt that, when he came into the service of the Organization in 1974, his letter of appointment and the applicable Staff Regulations and Rules provided him a contractual entitlement to reimbursement of income taxes on lump sum withdrawal of pension benefits. That this provision of the Staff Regulations and the Staff Rules was lawful, was settled by Judgement No. 237, Powell (1979). However, that judgement also pointed out in paragraph XIV that:

> "'Respect for acquired rights also means that the benefits and advantages accruing to a staff member for services rendered before the entry into force of an amendment cannot be prejudiced. An amendment cannot have an adverse retroactive effect in relation to a staff member, but nothing prevents an amendment to the Staff Rules where the effects of such amendment apply only to benefits and advantages accruing through service after the adoption of such amendment (Judgement No. 82, Puvrez).'"

VII. It follows from this that an amendment of the applicable Staff Regulations and Staff Rules which abolished the right to reimbursement would be permissible with regard to pension benefits resulting from service after such an amendment, but could not be applied retroactively with respect to pension benefits resulting from service prior to the amendment. Since the decision in this case does not deprive the Applicant of tax reimbursement with respect to the lump sum benefit allocable to service rendered prior to the change in the tax reimbursement system mandated by the General Assembly with effect from 1 January 1980, principles relating to acquired rights are not dispositive in this case. Nor

is it material whether, as he contends, the Applicant had an expectation during the 1974-1976 period or later with regard to the extent to which income taxes on a lump sum pension benefit would be reimbursable to him by the Organization. What is material is the effect of General Assembly resolution 34/165 on this case.

VIII. By way of background, the Powell case supra, in which the question of the legality of reimbursement by the Organization of income taxes levied on lump sum pension benefits was before the Tribunal, arose because in 1978, the United States, in various communications to the Organization, challenged the validity of that practice. The Office of Legal Affairs agreed with the position of the United States and so advised the Secretary-General, who suspended reimbursement, pending a determination by the Tribunal. In the Powell case, the issue was presented to the Tribunal and it rejected the various arguments put forth by the Respondent and the United States (an amicus curiae). The Tribunal held that, under the regulatory structure existing prior to the suspension, such tax reimbursement was lawful. That was the central issue before the Tribunal.

IX. The Tribunal's decision in Powell led to efforts by the United States, supported by others in the General Assembly, to obtain corrective legislation to prevent future reimbursement of such taxes by the Organization. It appears that when the resolution proposed to achieve this purpose was under consideration by the Fifth Committee in November 1979, the effective date for the change being contemplated was 1 January 1980. There was concern, however, about the situation of staff members in the service of the Organization. This was voiced by both the representative of the Federal Republic of Germany, which had introduced the proposed resolution, and by the Under-Secretary General for Administration, Finance and Management. The former spoke in terms of protecting acquired rights as the reason for the last clause of the proposed resolution. The latter spoke of protecting the interests of staff

members as of the date of the implementation of the new arrangements in terms of staff "currently on board." (See, Summary Record of the 60th Meeting, Fifth Committee, 27 November 1979, paras. 61 and 70).

X. Neither statement provides a definitive explanation of the precise intent of the General Assembly regarding the meaning of the second clause. The isolated comment of the representative of the Federal Republic of Germany regarding acquired rights, viewed in the light of what was said on that subject by the Tribunal in Powell (a decision that was plainly in the forefront of the consideration being given to the proposed resolution), would seem to suggest a more restrictive interpretation of the second clause than is compelled by its language. Such a narrow interpretation would also appear to be inconsistent with the intention reflected by the comments of the Under-Secretary General for Administration, Finance and Management. Accordingly, neither the statements referred to above nor the language of the resolution persuade the Tribunal that the General Assembly's intention was to deal with acquired rights solely as described in Powell, para. XIV, supra.

XI. The Applicant asserts that the resolution is clear in that it deals with only two classes of staff members: those who joined the Organization after 1 January 1980, without any prior service and those who also joined the Organization after 1 January 1980, but who had service performed prior to that date. According to the Applicant, the latter are entirely exempt from the prohibition against reimbursement of taxes set forth in the first clause of the resolution. The Tribunal is unable to accept this simplistic approach since it does not fairly take into account the main objective of the General Assembly. The Tribunal finds that the primary and overriding focus of the General Assembly was on discontinuance of tax reimbursement. The persons to be adversely affected by this discontinuance were all who joined the staff on or after 1 January 1980. But there was obviously concern about providing a degree of protection for persons who were serving staff

members on that date. Nothing before the Tribunal suggests that this concern related to individuals who were not then serving staff members of the Organization, but who had at some time in the past, whether briefly or not, been staff members, or that there was any reason for such a concern. The Tribunal does not accept the extraordinary proposition that the General Assembly, by the second clause of the resolution, wished to confer a potentially large windfall benefit on anyone appointed after 1 January 1980 who, although not in service at the time the resolution took effect, had served, however briefly, at any time in the past. In order to ascribe such an unusual intent to the General Assembly, the Tribunal would have to find that there was no other interpretation more in harmony with the dominant theme of ending tax reimbursement after 1 January 1980, which underlay the resolution. The Tribunal is unable to make such a finding.

XII. An entirely reasonable interpretation of the second clause of the resolution is possible which is in keeping with the General Assembly's purpose of discontinuing tax reimbursement and at the same time protecting staff members who then had a lively interest in the issue, i.e., those serving when the resolution became effective on 1 January 1980, and who continued to serve thereafter. In the Tribunal's view, the General Assembly wished to preserve tax reimbursement for those staff members both with respect to service before and after 1 January 1980. Without the protection intended by the second clause of the resolution, questions might have been raised concerning such a staff member's eligibility for tax reimbursement with respect to lump sum benefits allocable to service after 1 January 1980. It is understandable that the General Assembly might wish to continue the entitlement of such staff members to tax reimbursement. Since the Applicant was not within this category, the Tribunal is not called upon to address, in this case, the effect of the resolution on any staff member in the protected category who separated after 1 January 1980, but at a later date rejoined the Organization.

XIII. As construed above, the resolution implements the General Assembly's objective regarding new appointments after 1 January 1980, while at the same time generously protecting the expectations of staff members serving at the time the resolution became effective and continuing to serve thereafter.

XIV. The Applicant cites the decisions of the Tribunal in the Mills and Saddler cases as supporting his position. The Tribunal does not agree. In Saddler, the Applicant had not been in the service of the United Nations on 1 January 1980. He separated on 15 July 1978. There was no issue in that case as to the applicability of General Assembly resolution 34/165, since he did not rejoin the Organization. Instead, in 1981, he entered the service of one of the specialized agencies, and he was not governed by United Nations Staff Regulations and Rules. In that case, the Tribunal recognized the propriety of reimbursement to the Applicant with regard to the portion of the taxes paid by him on his lump sum benefit which was allocable to his service with the United Nations prior to 1980. In the present case, the Respondent's decision provides for similar tax reimbursement to the Applicant. It is therefore consistent with Saddler.

XV. Similarly in Mills, the Applicant had served in the United Nations from 1946 until 1979, when he transferred to a specialized agency where he was employed until his retirement in 1981. Thus, as in Saddler, the Applicant in Mills had not been in the service of the United Nations on 1 January 1980 and did not rejoin the UN after that time. General Assembly resolution 34/165 therefore had no bearing on that case either. In Mills, the Tribunal concluded that the Applicant was entitled to tax reimbursement with respect to the portion of his lump sum pension payment allocable to his period of service with the United Nations. That, too, is consistent with the Respondent's decision in the present case. The Applicant here is being reimbursed for taxes on the portion of his lump sum pension payment that is allocable to his service with the United Nations

prior to 1 January 1980, and that is all that he is entitled to. For him to receive a greater tax reimbursement would unjustifiably distort the purpose of the General Assembly in adopting resolution 34/165.

XV. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

Geneva, 6 July 1994

R. Maria VICIEN-MILBURN
Executive Secretary

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Administrative Tribunal

Distr.
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AT/DEC/635
6 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 635

Case No. 701: DAVIDSON

Against: The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, on 21 October 1992, Gabrielle Elizabeth Davidson, a participant in the United Nations Joint Staff Pension Fund, hereinafter referred to as "the Pension Fund", filed an application requesting from the Tribunal:

"...

(a) The setting aside of the decision of the Standing Committee of the Pension Board of 2 July 1992, ...;

(b) The award of a disability pension pursuant to article 33(a) of the Regulations of the Pension Fund;

(c) The award of costs of an amount of four thousand Swiss francs."

Whereas the Respondent filed his answer on 28 May 1993;

Whereas the Applicant filed written observations on 21 July 1993;

Whereas the facts in the case are as follows:

The Applicant, a former staff member of the International Labour Office (ILO), has been a participant in the Pension Fund from 1 April 1973. On 5 July 1989, the ILO Pension Committee considered the award of a disability benefit to the Applicant, under article 33 of the Pension Fund Regulations, and decided she was not entitled to it. On 20 September 1989, the Applicant requested the ILO Pension Committee to review its decision. A Medical Board was established, under Rule K.5 of Section K of the Administrative Rules of the Pension Fund, to assist the ILO Pension Committee in the re-consideration of the Applicant's case. While the request was pending, the Applicant, on 16 October 1989, submitted to the Pension Fund instructions for the payment of an early retirement benefit. The Applicant has been the recipient of such a benefit since 1 October 1989. On 30 September 1989, the Applicant separated from the service of ILO, upon the agreed termination of her appointment, under article 11.16 of the ILO Staff Regulations.

On 16 November 1990, the ILO Pension Committee, on the basis of the Medical Board's report, unanimously confirmed its earlier decision not to award a disability benefit to the Applicant. On 17 December 1990, the Secretary of the ILO Pension Committee informed the Applicant of the decision.

On 30 July 1991, the Applicant lodged an appeal with the Standing Committee of the United Nations Joint Staff Pension Board (UNJSPB) (the Standing Committee). At the request of the UNJSPB's Secretary, on 26 October 1991, the Applicant provided a detailed explanation for the delay in filing her appeal with the Standing Committee, which, under the Administrative Rules of the Pension Fund, should have been filed within three months of the receipt of the decision. She also confirmed that she would not request a new Medical Board.

On 14 January 1992, the Secretary of the UNJSPB informed the Applicant that her case would be presented to the next meeting of

the Standing Committee, on the basis of the documentation that had been submitted to the ILO Pension Committee, together with the supporting documentation and information she had provided in her various communications to the Secretary of the UNJSPB. An assessment of the Applicant's case by the medical consultant to the UNJSPB, dated 22 June 1992, was also provided to the Standing Committee.

On 2 July 1992, the Standing Committee decided to reject the Applicant's request. In a letter dated 22 July 1992, the Secretary of the UNJSPB informed the Applicant as follows:

> "After examining the documentation in your case, including the medical evidence you had provided, the Standing Committee decided that:
>
> (a) In view of the explanation you had provided for the delay in lodging your appeal to the Standing Committee, your appeal would not be deemed time-barred; and
>
> (b) The decision taken by the ILO Staff Pension Committee and confirmed upon review, that you were not entitled to a disability benefit from the UN Joint Staff Pension Fund be upheld, on the grounds that you had not been incapacitated for further service within the meaning of article 33(a) of the Fund's Regulations when you separated from ILO service on 30 September 1989."

On 21 October 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Standing Committee of the UNJSPB drew the wrong conclusions from the report of the Medical Board that had been set up to consider the Applicant's request for a disability benefit.

2. The Medical Board's report contains a number of factual errors and omissions.

Whereas the Respondent's principal contentions are:

1. The Applicant was not incapacitated for further service on the date of her separation.

2. The Applicant was accorded due process of law.

3. The decision by the Standing Committee denying the Applicant a disability benefit constituted a proper and reasonable exercise of the Standing Committee's authority and was based on medical evidence.

The Tribunal, having deliberated from 23 June to 6 July 1994, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Standing Committee of the UNJSPB (the Standing Committee), communicated to her by a letter dated 22 July 1992, which denied her a disability benefit under article 33(a) of the Pension Fund's Regulations. The Applicant separated from the ILO with effect from 30 September 1989, on the basis of an agreed termination of her appointment entered into in June 1988. The Applicant had sustained an injury in March 1988, which left her with some residual partial limitations on her range of motion. During the period from 16 May 1988 to 12 June 1988, she worked some of the time and was on sick leave for part of the time. Thereafter, the Applicant did not work but took annual leave until 8 November 1988. Under the terms of her agreed termination, her then existing appointment was terminated, with effect from 8 November 1988. As of 10 November 1988, she was given a fixed-term contract of one year, under which she was placed on special leave without pay to enable her, if she wished, to continue to contribute to the Pension Fund.

II. In connection with the Applicant's agreed termination, it was indicated that thereafter, she was going to apply for a disability

benefit from the Pension Fund on the basis of the combined effects of a serious illness she had suffered in 1985, from which she had recovered, and two subsequent episodes in which she sustained injuries. At the time the agreed termination was being contemplated by the ILO, a negative view as to her possible entitlement to a disability benefit had been expressed by the ILO's Medical Advisor. As noted above, at the time of her official separation, the Applicant was not on sick leave. Moreover, an internal ILO document dated 8 March 1988, which was submitted by the Applicant, indicates that consideration was being given to offering the Applicant an agreed termination because of a number of factors "likely to have a negative impact on her work and her working relationships." But nothing in this document or elsewhere in the record indicates any belief by the ILO that the Applicant was incapacitated for further service on medical grounds, or that this was the underlying reason for such a termination.

III. In connection with the review by the ILO Pension Committee of its denial of the award of the disability benefit to the Applicant, a Medical Board was convened. The Medical Board unanimously concluded that the Applicant had suffered adverse psychological effects stemming from earlier ailments and based on a depressive personality. It decided by a 2-1 majority (the minority being the physician appointed by the Applicant) that this did not incapacitate the Applicant on a long-term basis for further service. With the Medical Board report, and other evidence before it, the denial of the award of a disability benefit was upheld by the ILO Pension Committee and later by the UNJSPB. The criterion for entitlement to a disability benefit under article 33(a) is that the staff member must have become "incapacitated for further service ... reasonably compatible with his abilities, due to injury or illness constituting an impairment to health which is likely to be permanent or of long

duration." The Applicant agrees with the Respondent's contention that this criterion does not encompass partial disability.

IV. The Applicant's appointee to the Medical Board submitted a clarifying statement making the point that, although he agreed with the basic diagnosis of the majority, he felt that this incapacitated her for further service. He also pointed out (and this is reflected in the Medical Board report) that the members of the Board had considered, in addition, whether the award of a disability benefit to the Applicant would be helpful or harmful in terms of her overcoming the adverse psychological effects. The majority felt that award of a disability benefit would be unhelpful; the minority member reached the opposite conclusion.

V. In the view of the Tribunal, the latter issue is only marginally relevant, if at all, to the central issue decided by the Medical Board. Although the majority's view is not inconsistent with its conclusion on the central issue, the matter of what might be best for the Applicant's future mental condition is not directly pertinent to the issue of her entitlement, if any, under article 33(a). As to that issue, the conclusion of the majority of the Medical Board is clear and provides reasonable support for the determination of the Standing Committee from which the Applicant appeals.

VI. The Tribunal has held consistently that it will not attempt to substitute its judgement on medical matters for a properly rendered judgement by a medical board. The Applicant also agrees that this is the governing jurisprudence. This principle is even more firmly applicable in cases involving the subject of psychological ailments and their consequences. In this area, which is open to abuse and exaggerated claims, the Tribunal would be reluctant to overturn a reasonable judgement by the Standing

Committee, predicated on a medical board conclusion. The Applicant contends that the evidence of her entitlement to a disability benefit is so clear and convincing that the Tribunal should order the Pension Board to award it to her. The Tribunal is unable to accept that contention on the basis of the record before it.

VII. The Applicant also contends that the Standing Committee's determination was procedurally flawed because it appears to have been based, in part, on a memorandum dated 22 June 1992, from the Pension Board's medical consultant, which had not been made available to the Applicant for comment before the Standing Committee rejected her request, and because that memorandum contained alleged factual errors. In addition, the Applicant asserts that the original Medical Board report was not made available to her in time for her to comment on it before it was considered by the Standing Committee. As to the latter point, while it is, of course, desirable that such reports should be made available to applicants with reasonable promptness, the Tribunal has difficulty understanding why its contents, if not the document itself, would not normally have been made available to the Applicant by the member of the Board appointed by her. (Cf. Judgement No. 502, Giscombe (1991), para. IX.) There is no apparent reason why applicants would be unable to arrange to be informed by their own appointees as to the contents of medical board reports. In any case, where this should not prove to be feasible, the Respondent should make the report available promptly. Here, it is unclear whether the Applicant was informed of the contents of the report before she received a copy. She does not press the point. In any event, she was given the opportunity to request a new Medical Board when her case was under consideration by the Standing Committee, but she declined to do so.

VIII. With respect to the Applicant's contention regarding the memorandum dated 22 June 1992, from the Pension Board's medical consultant, the Tribunal considers that it would have been the better practice for the Pension Board to have made a copy of this memorandum available to the Applicant so that she could have commented on it, if she wished, before it was considered by the Standing Committee. However, in the circumstances of this case, the Tribunal finds that this irregularity was both minor and harmless, and does not require any further action by the Tribunal.

IX. The Applicant concedes that some of the alleged errors in the memorandum were insignificant. Those alleged to be of consequence are the absence of a reference to various medical reports previously submitted by the Applicant. But there is no basis for an assumption by the Tribunal that those medical reports were not in the record before the Standing Committee. Nor was the medical consultant obliged to discuss them. Hence, the fact that the 22 June 1992 memorandum did not refer to them is of no consequence. Secondly, the Applicant asserts that the 22 June 1992 memorandum, in purporting to sum up the situation, was in error in failing to recognize that one medical report, dated 14 November 1991, previously submitted by the Applicant to the Pension Fund, stated that since 14 September 1989, the Applicant had been unfit for work. However, that medical report, which was issued long after the Applicant had ceased working for the ILO, did not state that the Applicant was incapable of further service reasonably compatible with her abilities on a permanent or long term basis. It was, therefore, not in conflict with the summing up of the situation by the Pension Board's medical consultant. Nor, as claimed by the Applicant, was the summing up inconsistent with an earlier report dated 21 October 1988, by a physician who treated the Applicant. That physician also did not assert that the Applicant was incapacitated to the point of being incapable of further service on

a permanent or long term basis. Finally, the Applicant claims that a statement in the summing up portion of the memorandum, that the Applicant had been examined by a doctor from the Joint Medical Service in Geneva, who concluded that she was not incapacitated to the point of being incapable for further service, was erroneous. Whether the doctor named had actually examined the Applicant does not appear to be of decisive importance in the circumstances of this case. The record shows that the Joint Medical Service in Geneva had been apprised of the Applicant's medical history and had informed the ILO of its belief that she was not incapacitated for work to the point of being incapable of further service. Moreover, the members of the Medical Board who also reached that conclusion, did examine her.

X. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

Geneva, 6 July 1994

R. Maria VICIEN-MILBURN
Execuive Secretary

AT

UNITED
NATIONS

Administrative Tribunal

Distr.
LIMITED

AT/DEC/636
8 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 636

Case No. 713: NOLL-WAGENFELD

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas at the request of Meike Angelika Noll-Wagenfeld, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 30 November 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 19 November 1992, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 8 February 1993, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, to order the Respondent to, inter alia:

"...

(i) ...announce ... the addition of the Applicant's name to the 1987 P-5 (Senior Officer) Promotion Register;

(ii) ...rescind [the] decision ... that the effective date of [the Applicant's] promotion should ... be ... 1 April 1992;

(iii) ...implement the Applicant's promotion to the P-5 level, under the 1987 promotion review retroactive to 1 October 1987, ...

(iv) ...restore to the Applicant the seniority in grade and emoluments of which she has been deprived as a consequence of:

(a) The failure of APB [Appointment and Promotion Board] to give full and fair consideration to her eligibility for promotion under the 1987 promotion review; and

(b) The arbitrary and discriminatory decision to establish the effective date of her promotion at 1 April 1992 and not earlier;

(d) In the event that the Secretary-General decides, in the interest of the United Nations, to pay compensation for the injury sustained in accordance with the option given to him under article 9, paragraph 1, of the Statute, the Applicant requests compensation as follows:

An amount equivalent to the difference between the salary and emoluments received for the period 1 October 1987 to date and ... [what] she would have received had she been promoted to the P-5 level effective 1 October 1987."

Whereas the Respondent filed his answer on 13 July 1993;

Whereas the Applicant filed written observations on 1 September 1993;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 October 1975, on a probationary appointment at the P-3, step 1 level, as a Human Rights Officer in the Division of Human Rights at the United Nations Office in Geneva (UNOG). On 1 October 1977, she received a permanent appointment and she was promoted to the P-4 level, with effect from 1 April 1980.

On 1 September 1986, the Applicant was transferred to the Office of the Director General as "Assistant to the Director-

General". On 14 October 1986, the Director-General recommended the Applicant's promotion to the P-5 level in connection with the 1986 promotion review exercise. He noted that she would assume "the duties vacated by ... and by May 1987, she will replace ... as Senior Legal Officer."

On 17 June 1987, the Assistant Secretary-General for Human Resources Management announced to the staff, in information circular ST/IC/87/35, the 1986 Senior Officer (P-5) Promotion Register. The Applicant's name was not included therein. The Applicant subsequently instituted a recourse procedure in accordance with paragraph 4 of ST/IC/87/35, against the non-inclusion of her name in the 1986 Senior Officer Promotion Register, but was unsuccessful.

On 28 July 1987, the Officer-in-Charge of UNOG announced in information circular No. 3425, that the Applicant had been appointed Senior Legal Officer, with effect from 1 April 1987.

In a memorandum dated 3 June 1988, the Director-General recommended that the Applicant be promoted to the P-5 level, in connection with the 1987 promotion review exercise. He noted in his recommendation that the Applicant "has proven to be a very professional, capable and thorough incumbent of the post which is classified at the P-5 level".

On 22 May 1989, the Assistant Secretary-General for Human Resources Management announced to the staff, in information circular ST/IC/89/37, the 1987 Senior Officer (P-5) Promotion Register. The Applicant's name was not included. On 21 June 1989, the Applicant instituted a further recourse procedure against the non-inclusion of her name in the Register, in accordance with paragraph 4 of ST/IC/89/37. In her letter of recourse addressed to the Chairman of the Appointment and Promotion Board (APB), the Applicant argued that since her performance had been fully satisfactory, she could only assume that the Board had taken other facts into account, found in United Nations Administrative Tribunal Judgement No. 410, in deciding not to include her name in the Register. In this

Judgement, rendered on 13 May 1988, the Tribunal held that the Applicant was not entitled to receive payment of her salary at the dependency rate and a dependency allowance in respect of two of her children as her husband, who was an employee of the International Telecommunication Union, was also receiving his salary at the dependency rate in respect of their elder daughter and such payment constituted duplicate payment of dependency benefits, prohibited under the Staff Rules.

She added: "if after having carefully considered my explanations as to UNAT Judgement No. 410, ... you nevertheless believe that my behaviour amounted to misconduct and should be sanctioned, then please refer my case to the Secretary-General proposing that the allegations be examined by a Disciplinary Committee as foreseen by the Staff Rules and Regulations." She concluded by stating that to take into account Judgement No. 410 "in order to justify" the non-inclusion of her name in the Register "would amount to demotion, a disciplinary measure which can only be applied as a result of disciplinary proceedings."

In a letter dated 7 December 1989, the Chairman of the APB informed the Applicant that, notwithstanding the additional information presented to the APB, the APB had decided that there were no grounds to amend its previous recommendation not to include her name in the 1987 P-5 Promotion Register.

In a letter dated 3 January 1990, the Applicant requested the Secretary-General to review the administrative decision not to include her name in the 1987 P-5 Promotion Register. In a reply dated 20 March 1990, the Director, Staff Administration and Training Division, Office of Human Resources Management, wrote to the Applicant, inter alia, as follows:

> "...
>
> It has been the function of the Appointment and Promotion bodies to evaluate the promotion recommendations

made by the relevant department, to consider all the staff members having the required seniority in the light of the criteria set out in the Staff Regulations, and to submit their recommendation to the Secretary-General for his decision. In evaluating the recommendation for your promotion, the Board could properly take into account Judgement No. 410 previously rendered by the Administrative Tribunal. The definition of the standards applicable to all staff members, which was contained in that judgement, did not involve any issue of fact which would have required the intervention of the Joint Appeals Board. The decision not to recommend you can in no way be seen as a 'demotion', as you characterize it, since you have remained at the level which was yours when the judgement was rendered."

On 27 April 1990, the Applicant lodged an appeal with the Geneva Joint Appeals Board (JAB). The JAB adopted its report on 9 December 1991. Its conclusions and recommendation read, in part, as follows:

"35. ...the Panel concludes:

(a) That the guidelines for the 1987 promotion review are applicable to the Appellant's case;

(b) That prima facie the criteria for promotion contained in the guidelines for the 1987 promotion review had been fully met by the Appellant;

(c) That it was not justified to take into account certain statements of Judgement No. 410 as a basis for the non-recommendation for promotion of the Appellant.

36. Therefore, the Panel unanimously recommends to the Secretary-General that the Appellant's case for promotion be reconsidered fully, fairly and objectively under the guidelines for the 1987 promotion review, taking into account the conclusions of the Panel."

On 31 January 1992, the Director, Office of the Under-Secretary-General for Administration and Management, transmitted to the Applicant a copy of the JAB report and informed her as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. He shares the Board's conclusion that your case fell within the guidelines of the 1987 promotion review and that you should, therefore, have been given full consideration for promotion under the 1987 review. Due to the procedural grounds, which were given as one of the reasons for the rejection of your case, such full consideration would appear not to have been given. At the same time, the Secretary-General wishes to reaffirm that, in accordance with regulation 4.5, the paramount consideration in promotion shall be the necessity of securing the highest standards of efficiency, competence and integrity.

The Secretary-General has decided, accordingly, that your case should be remanded to the Appointment and Promotion Board (APB) for full and fair consideration of your eligibility for promotion under the 1987 review taking into account all relevant criteria. If the outcome of this review is not positive, the APB should be requested to consider your promotion within a reasonable period thereafter as an exception to the Vacancy Management System."

On 6 July 1992, the Under-Secretary-General for Administration and Management informed the Applicant as follows:

"Further to the decision of the Secretary-General regarding your appeal, which was conveyed to you on 31 January 1992, the Appointment and Promotion Board has completed its consideration of your candidature for promotion to P-5 level.

Having reviewed the facts relating to your case (the Administrative Tribunal Judgement No. 410, the Geneva JAB recommendations...) as well as the recommendation of the Appointment and Promotion Board that the promotion date not be retroactive but be closer to the date of the Board's deliberations on the case, I have decided, on behalf of the Secretary-General, that the effective date of your promotion to the P-5 level shall be 1 April 1992.

This constitutes the full implementation of the decision conveyed to you on 31 January 1992. ..."

The Applicant's promotion to the P-5 level was implemented with effect from 1 April 1992.

On 8 February 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. As the Respondent determined that the Applicant met all relevant criteria for promotion under the 1987 promotion review exercise, he must consider that the Applicant fully merits promotion under that review insofar as all the necessary criteria under the Staff Regulations and specific guidelines for that review have been met.

2. The determination of the effective date of promotion from the annual promotion registers has never been a function of the date on which the APB conducts its deliberations.

3. The recommendation by the APB that the effective date of promotion should be "closer to the date of the Board's deliberations" and the Respondent's decision that such date should be 1 April 1992, are arbitrary and discriminatory and constitute a punitive measure.

Whereas the Respondent's principal contention is:

The decision on the effective date of the Applicant's promotion lies within the Respondent's discretion, which he properly exercised in the present case.

The Tribunal, having deliberated from 30 June to 8 July 1994, now pronounces the following judgement:

I. The Applicant appeals from a decision by the Respondent dated 6 July 1992, promoting her to the P-5 level, with effect from 1 April 1992. The Applicant contends that this action violated her rights because her promotion was not made retroactive to 1 October 1987, the earliest possible date established in information circular

ST/IC/89/37, dated 24 May 1989, for promotion from the 1987 register. The Applicant thus asks for the seniority in grade and emoluments to which she would have been entitled had she been promoted to the P-5 level, with effect from 1 October 1987. In the alternative, if she is to receive only compensation, the Applicant asks that it be equivalent to the difference between her salary and emoluments for the period from 1 October 1987 to date and the salary and emoluments, including appropriate step increments which she would have received if she had been promoted to the P-5 level, with effect from 1 October 1987.

II. The broad issue raised by the Applicant is whether the Respondent's decision, dated 6 July 1992, constituted an abuse of discretion. It is well settled by the Tribunal's jurisprudence that promotions of staff members are not matters of right but are within the discretion of the Respondent. This is equally so with respect to the effective date of a promotion. The Tribunal has held repeatedly that qualifications, experience, performance reports, and all other factors relevant to promotion are appraised freely by the Secretary-General and that the Tribunal will not substitute its judgement concerning such matters. The Tribunal has also made it clear that the discretion of the Secretary-General must be exercised within the applicable legal norms and that it cannot be improperly motivated or exercised in an arbitrary or discriminatory manner. Hence, the specific question for examination by the Tribunal is whether the Respondent's decision not to make the Applicant's promotion retroactive to 1 October 1987 was unlawful because of wrongful motivation or because it was arbitrary or discriminatory.

III. The Tribunal notes at the outset that the information circular referred to above, on which the Applicant relies, did not mandate that promotions made as a result of the 1987 promotion review be with effect from 1 October 1987. That date was merely

described as the earliest possible effective date for promotion from the 1987 register. It did not prohibit a later effective date. Accordingly, there is no question in this case of inconsistency between the effective date of the Applicant's promotion and a date required by a rule, regulation, or binding administrative issuance.

IV. When the Applicant was first considered for a promotion in connection with the 1987 promotion review, it appears that she did not receive a favourable recommendation for two reasons. First, it was thought that she was not eligible because of limitations associated with the institution of the Vacancy Management System. In addition, Judgement No. 410, Noll-Wagenfeld, dated 13 May 1988, was evidently taken into account as bearing on whether the Applicant had met the highest standards of efficiency, competence, and integrity. The Applicant submitted an extensive recourse to the Chairman of the APB, setting forth her views with regard to Judgement No. 410 and, in particular, matters raised by some aspects of the case involving her integrity. The APB, by a letter to the Applicant dated 7 December 1989, from its Chairman, informed her that it had given full and careful consideration to the information contained in her recourse, but had concluded that it did not provide grounds for amending its previous recommendation.

V. The Applicant then submitted her case to the Joint Appeals Board (JAB). The JAB concluded that the Administration had erred in believing that the Applicant was not eligible for promotional consideration because of the limitations related to the Vacancy Management System. It also concluded that Judgement No. 410 was an extraneous factor which should not have been taken into account by the APB or the Respondent. The JAB recommended that the Applicant's case for promotion be considered fully, fairly, and objectively under the guidelines for the 1987 promotion review, taking into account the JAB's conclusions.

VI. The Respondent, by a decision dated 31 January 1992, informed the Applicant that he shared the JAB's conclusion that her case fell within the guidelines of the 1987 promotion review and that she should have been given full consideration under it. At the same time, the Respondent reaffirmed that, in accordance with staff regulation 4.5, the paramount consideration in promotion "shall be the necessity of securing the highest standards of efficiency, competence, and integrity." The Applicant's case was then remanded to the APB for full and fair consideration of her eligibility for promotion under the 1987 review, taking into account all relevant criteria. That review and the APB recommendation that the promotion date not be retroactive, but be closer to the date of the APB's deliberations, led to the decision dated 6 July 1992, being appealed by the Applicant.

VII. Reduced to its essentials, the Applicant's position is that the Tribunal should hold that, in considering the effective date of her promotion, the Respondent could not lawfully take into account facts surrounding the Tribunal's Judgement No. 410. However, for the Tribunal to so hold would be tantamount to substituting its judgement for that of the Secretary-General with respect to the facts to be taken into account in considering a promotion. That, as the Tribunal's jurisprudence establishes, is not the role of the Tribunal. The Tribunal finds that it was proper for the Respondent to consider the facts surrounding Judgement No. 410 to be relevant. It was therefore neither arbitrary nor discriminatory for the Respondent to take them into account in exercising his discretion regarding the effective date of the Applicant's promotion. Contrary to the view of the JAB, those facts are not an extraneous factor that the Respondent was compelled to ignore in deciding whether and the extent to which the "highest" standards were met by the Applicant, or as to the manner in which the Respondent should exercise his discretion regarding the effective date of her

promotion. It would be an unwarranted intrusion for the Tribunal to hold that the Respondent was required in such a context to disregard facts regarding a staff member's past conduct, whether or not that conduct happened to be involved in a prior Tribunal decision. What was said about those facts in Judgement No. 410, as well as what was said by the Applicant in her recourse, comprised material relevant to the criteria for promotion and the Respondent was entitled to appraise that material freely. That is what was done.

VIII. With respect to decisions involving promotions or their effective date, the Secretary-General's discretion is necessarily judgemental. So long as it is not tainted by arbitrariness, bias, discrimination, mistake of fact, or other extraneous factors, it will not be overturned by the Tribunal. In this case, the Tribunal is unable to perceive the presence of any such flaws.

IX. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Francis SPAIN
Member

Mayer GABAY
Member

Geneva, 8 July 1994

R. Maria VICIEN MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/637
8 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 637

Case No. 694: CHHATWAL

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, First Vice-President, presiding; Mr. Luis de Posadas Montero, Second Vice-President; Mr. Mikuin Leliel Balanda;

Whereas, on 1 September 1992, Tarvinder Singh Chhatwal, a former staff member of the United Nations Children's Fund, hereinafter referred to as UNICEF, filed an application requesting the Tribunal, inter alia:

"...

11.

(a) To find that the separation/termination order served upon the Applicant ... dated 4 February 1992 (...) is not legally valid...

...

(g) To find that the local UNICEF Management has failed to give appropriate notice of termination/ separation...

(h) To find that the local UNICEF Management was wrong in holding that the service of the Applicant was unsatisfactory...

...

(i) To find that the allegation of 'medically unfit' is patently wrong...

(j) To find that one superior colleague ... had ... been indulging in ... unfair and unjust but systematic complaints against the Applicant...

(k) To find that the Applicant was mentally tortured and harassed, humiliated etc. by UNICEF Management..."

Whereas the Respondent filed his answer on 7 December 1992;

Whereas, on 6 April 1994, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, put a question to the Respondent, to which he provided an answer on 15 April 1994;

Whereas the Applicant filed written observations on 20 June 1994;

Whereas, on 28 June 1994, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant was initially hired by UNICEF in March 1971, on a series of Special Service Agreements as a Clerk/Typist, in the sub-office in Bombay, India. On 1 January 1974, he received a three-month fixed-term appointment as a Parts Clerk at the ND-3, step II level. His appointment was extended for further fixed term periods of varying duration, until 31 May 1990, the expiration date of his last fixed-term appointment.

During the course of his employment with UNICEF, he received successive promotions to the ND-4, step II level, with effect from 1 January 1981, and to the ND-6 level, with effect from 1 August 1984.

The Applicant's last extension was for the duration of one year, from 1 June 1989 until 31 May 1990. According to the record, when the Administration was considering this extension, the Applicant was advised that there would be "quarterly reports on

[the Applicant's] conduct ... and performance" during the term of the extension. In addition, the UN Medical Director reviewed the Applicant's medical records and classified him as 2A (candidates who have a correctible medical impairment and are only eligible for employment after this has been corrected or candidates who have had a serious medical problem and who cannot be cleared yet for employment). The Applicant was advised to obtain counseling and medical treatment, otherwise the Office of Personnel Services would "not be in a position to extend [the Applicant's] contract on a 2A classification."

On 28 March 1990, the local Appointment and Placement Committee (APC) met to consider the Applicant's contractual situation. It noted that the Applicant's performance had deteriorated and that his supervisors had recommended that his fixed-term appointment should not be extended beyond its expiration date of 31 May 1990. There was, however, no agreement among the five members of the APC as to the final recommendation. Three members suggested that, on humanitarian grounds and because of his initial good performance, the Applicant should be considered for a lateral transfer on a fixed-term appointment of one year, so that his performance could be monitored in a different work situation. Two members of the Committee recommended that the Applicant's contract should not be extended as he had already been given ample opportunity to improve his performance. The UNICEF Representative in the India Country Office (ICO), decided not to extend the Applicant's fixed-term appointment.

On 5 April 1990, the Personnel Officer at the ICO informed the Applicant of the decision not to renew his fixed-term appointment upon its expiration date, on 31 May 1990.

On 6 April 1990, the Applicant filed a complaint with the Ombudsperson at UNICEF/ICO, alleging that the decision to let his fixed-term appointment expire was due to false allegations and charges made against him by his supervisor. In his report to the Director of UNICEF/ICO, submitted on 22 May 1990, the Ombudsperson concluded as follows:

"The case was found very complicated and it was difficult to find fault and conclusive evidence to decide who was at fault - the staff member, supervisors or other Managers. Surely, members of the APC might have faced the same dilemma.

However, considering the very long years of service of the staff member, and keeping in view the interest and good image of the Organization, the Director, ICO, may use her discretion, in good faith, to give one more chance to the staff member.".

On 16 May 1990, the Applicant requested the Executive Director of UNICEF to review the administrative decision not to extend his fixed-term appointment beyond 31 May 1990.

On 26 July 1990, the Director of Personnel at Headquarters informed the Applicant that, as he was sick at the time of his separation from service, a substantive reply to his request for review would be given when the medical evaluation of his case had been completed.

On 21 September 1990, the Applicant was informed by the Division of Personnel at Headquarters that, after reviewing his medical condition, the UN Medical Director had decided that the Applicant should continue on sick leave. The Applicant was accordingly reinstated, on sick leave, on full pay, until further notice from the Medical Director. On 1 October 1990, the Applicant was informed that he would be reinstated, with effect from 1 June 1990.

On 9 November 1990, the Personnel Officer informed the Applicant that the Administration had forwarded to the Secretary of the Pension Board a recommendation to award him a disability benefit in accordance with article 33 of the Regulations and Rules of the United Nations Joint Staff Pension Fund. In the interim, he was being placed on sick-leave, with half-pay, with effect from 26 October 1990, as he had exhausted his entitlement to sick leave on full pay.

On 6 March 1991, the Applicant wrote to the Executive Director of UNICEF alleging "biased action, mental torture and harassment" on the part of his supervisor.

On 13 June 1991, the Deputy Executive Director wrote to the Applicant as follows:

> "Based on all the factors outlined above, we consider that the UNICEF Representative, ICO, properly exercised her authority, in strict accordance with due process, to allow your fixed-term appointment to expire as of c.o.b. [close of business] 31 May 1990. You had been told as early as 1988, that you must improve your performance if you wanted to remain in UNICEF. The Organization gave you numerous opportunities as well as time to improve, however you failed to do so. Additionally, it is well documented that you had problems not only with your immediate supervisor, but with your second reporting officer as well as your previous supervisors and other office staff who had written to complain about you. Therefore, we maintain that the non-renewal of your fixed-term appointment for unsatisfactory performance stands. We further do not consider that the documentation presented reflects that your last supervisor, [...], behaved in a prejudicial manner towards you. We further consider your unsubstantiated allegations against [your supervisor] in connection with his dealings with outside suppliers to reflect poorly on your judgement."

On 24 July 1991, the Executive Director of UNICEF wrote to the Applicant and confirmed the decision conveyed by his Deputy in her letter of 13 June 1991. On 23 August 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against the decision not to extend his fixed-term appointment.

On 25 November 1991, the Applicant was informed by the Secretary of the United Nations Joint Staff Pension Board as follows:

> "...the United Nations Staff Pension Committee has determined that you are incapacitated for further service and consequently entitled to a disability benefit under article 33 of the Regulations of the Fund... The payment of your benefit will take effect on the date following that on which you cease to be entitled to salary and emoluments from the United Nations."

On 4 February 1992, the Chief, Personnel Services, informed the Applicant that he would be eligible to receive a disability benefit from the United Nations Joint Staff Pension Fund with effect from 1 February 1992, and that it had been therefore decided to separate him from the Organization with effect from 31 January 1992, from which date the Applicant would cease to receive salary and allowances from UNICEF.

On 23 August 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 6 May 1992. Its considerations and recommendations read, in part, as follows:

"Considerations and recommendations

...

17. The Panel, ..., expressed some concern at the absence of documentation supporting the Administration's contention that Appellant's behaviour had given rise to letters of complaint from his colleagues and supervisors other than [the Officer-in-Charge, Logistics Unit, Bombay]. In this connection, the question was raised whether the beginning of his difficulties with other staff coincided with his complaint alleging overpayments by UNICEF for material acquired, as a result of the actions of staff responsible for its purchase who did not challenge overpricing by the companies supplying it.

18. In the absence of any conclusive indications, such as the outcome of disciplinary proceedings, if they had been held, the Panel found itself unable to determine whether the discontinuance of Appellant's employment would have been justified on grounds of unsatisfactory conduct and performance.

19. The Panel took note, however, of the fact that as the separation of Appellant from service was the consequence of his having been awarded a disability benefit by the UNSPC [United Nations Staff Pension Committee], his separation was due to health grounds, rendering academic the question of the adequacy of alternative grounds for discontinuance of his service.

20. As to the justification for the award of a disability benefit to the Appellant, the Panel noted that it neither had the necessary information nor the required competence to deal with the medical aspects of the award. But it wishes to draw attention to the fact that the procedures laid down in the administrative rules of the UNJSPF [United Nations Joint Staff Pension Fund] for challenging the award of a disability benefit, including the setting up of a Medical Board to deal with its medical aspects, have not yet been exhausted by the Appellant.

21. The Panel, therefore, unanimously recommends that if these procedures should be invoked by the Appellant, any time-limits which might have been exceeded by then, should be waived by the Committee considering this appeal."

On 10 June 1992, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. Taking into consideration all the circumstances of your case, and particularly the serious deterioration of your performance under several supervisors prior to the decision not to renew your fixed-term appointment, the Secretary-General finds that such decision was fully justified.

He has taken note that the original decision not to extend your appointment was superseded by the decision to maintain you in service while your medical condition was being evaluated, and by the subsequent decision to terminate your appointment for health reasons on 31 January 1992, one day before you became eligible to receive the disability benefit which had been awarded to you by the United Nations Staff Pension Committee in November 1991.

The Secretary-General agrees with the Board's conclusion that, if you so wish, you should be allowed to challenge the basis on which a disability benefit was awarded to you. Bearing in mind, however, that he has no decision-making authority under the Regulations and Rules of the United Nations Joint Staff Pension Fund, he cannot endorse the Board's recommendation that the United Nations Staff Pension Committee should waive the normal time-limits in the event you decide to ask that Committee to reconsider the award of a disability benefit to you.

Since the termination of your appointment for reasons of health was based on the Medical Director's determination that you were incapacitated for further service, the Secretary-General has decided that a request on your part to have that determination reviewed by a Medical Board would be entertained, even though it would be outside the normal time-limits, provided it is received by the Medical Director in New York within two months of the date of this letter.

The Secretary-General wishes to draw your attention to the fact that, in the event a Medical Board were to reverse the Medical Director's determination, the only result would be that you would no longer be eligible to receive the disability benefit which has been awarded to you. It would not mean that you would return to service with UNICEF. The only reason for not separating you from service upon the expiry of your fixed-term appointment was to allow for a determination of your medical condition and to permit you to receive a disability benefit. Should the determination that you were incapacitated for further service be reversed, the prior decision not to extend your appointment would be given full force and effect. In other words, given your prior unsatisfactory service, UNICEF would not grant you a further appointment."

On 1 September 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision by the Respondent not to extend the Applicant's fixed-term appointment on medical grounds was in violation of the provisions of the UNICEF Personnel Administration Manual on the termination of appointments.

2. The termination of the Applicant's appointment also violated United Nations staff regulation 9.1(a).

3. The Applicant was exposed to "extreme mental torture and humiliation" to which the management of UNICEF/ICO was indifferent.

Whereas the Respondent's principal contentions are:

1. The first decision was to allow the Applicant's fixed-term appointment to expire. Expiration of appointments is not

termination of appointments, within the meaning of regulation 9.1 of the United Nations Staff Regulations and Rules. Procedures for termination of appointments are inapplicable to cases of expiration of fixed-term appointments.

2. The second decision was based on a determination by the UN Medical Service that the Applicant was incapacitated for further service. This decision did not violate his rights.

3. The Applicant's charges of "mental torture and harassment" by his supervisor are unfounded.

The Tribunal, having deliberated from 23 June to 8 July 1994, now pronounces the following judgement:

I. The Applicant appeals from a decision dated 10 June 1992, by the Secretary-General. That decision adopted a recommendation by the Joint Appeals Board (JAB) for waiver of time limits should the Applicant wish to request a Medical Board in order to challenge the termination of his appointment for reasons of health. Originally, there had been a decision not to extend the Applicant's appointment for reasons which included a "serious deterioration" of the Applicant's performance "under several supervisors." However, that was superseded by a decision to retain the Applicant while his medical condition was being evaluated. Following the evaluation, the Applicant's appointment was terminated for health reasons on 31 January 1992. He thereupon became eligible to receive the disability benefit awarded to him by the United Nations Staff Pension Committee as of 1 February 1992.

II. The Applicant did not avail himself of the opportunity to request a Medical Board for review of the health reasons for which his appointment had been terminated and his disability benefit had been awarded. Instead, he has been receiving the disability benefit from the United Nations Joint Staff Pension Fund since 1 February 1992.

III. The Applicant's original claim considered by the JAB was for compensation in the amount of $10 million for extreme mental torture, harassment, etc., by his supervisors and by others of the India Country Office of UNICEF. The JAB found itself unable, on the basis of the evidence before it, to determine the validity of the Applicant's claim that, because there had been no deterioration in the quality of his performance and conduct and because he was perfectly fit to continue in service, his fixed-term appointment should have been renewed on its expiration on 31 May 1990. Nor did it deem itself competent or in possession of the necessary information to deal with the question of whether, for reasons of health, the Applicant was no longer able to perform his duties. The JAB considered that, as the Applicant had been separated for reasons of health, the question of the adequacy of alternate grounds for discontinuance of his service had become academic.

IV. The Tribunal agrees with the JAB's analysis. There is no reason for the Tribunal to examine the decision to allow the Applicant's fixed-term appointment to expire since that decision was not implemented. In the meantime, the Applicant continued to receive his salary and was on sick leave, in accordance with the applicable provisions of UNICEF's Personnel Administration Manual, until his termination for medical reasons. The Applicant has not challenged his termination for medical reasons. He has not requested a Medical Board. Hence, there is no ground for further examination of that decision by the Tribunal. Nor is there any merit to the Applicant's contention that his termination violated staff regulation 9.1(a) since that regulation is inapplicable to staff members holding fixed-term appointments. Similarly, there is no basis for a finding that the Applicant's charges of mental torture and harassment by his supervisors were established. Those charges were investigated by an Ombudsperson, who was unable to

determine whether they were meritorious, or to decide who was at fault. Mainly because of the Applicant's length of service, he recommended that, as a discretionary matter, the Applicant be given another chance.

V. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-President

Mikuin Leliel BALANDA
Member

Geneva, 8 July 1994

R. María VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/638
13 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 638

Case No. 709: TREGGI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Second Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas at the request of Gian Carlo Treggi, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 January 1993, the time-limit for the filing of an application to the Tribunal;

Whereas, on 25 January 1993, the Applicant filed an application requesting the Tribunal, inter alia:

> "(a) to declare invalid the decision of the Secretary-General to reject the Applicant's request for reimbursement of the portion of the airfares to the former Soviet Union during his official travel in June 1991 and daily subsistence allowance for a three-day stay in that country;
>
> ...
>
> (e) to find that the Applicant has acted in good faith and in the interests of the United Nations;
>
> (f) to find that the Applicant's mission, far from creating problems, has been beneficial to the Organization, and that, therefore, the Organization, in denying the Applicant the reimbursement for the costs incurred in connection with the travel, has obtained an unjust enrichment;
>
> ...

(h) to order the Secretary-General to reimburse the Applicant for the costs incurred in connection with the travel to the former Soviet Union;

(i) to fix the amount of compensation payable to the Applicant for the injury sustained as a result of unwarranted and widely circulated attacks upon his integrity, and for the adverse publicity resulting from notoriety conferred on him."

Whereas the Respondent filed his answer on 13 May 1993;

Whereas the Applicant filed written observations on 20 December 1993;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 25 March 1971, on a probationary appointment at the P-3, step 1 level, as an Administrative Officer in what is now the Office of Human Resources Management (OHRM). On 1 May 1972, his functional title was changed to Recruitment Officer and on 1 May 1973, his appointment was converted to permanent. The Applicant was promoted to the P-4 level, with effect from 1 April 1974. On 1 July 1978, he was transferred to the Department of Technical Cooperation and Development (DTCD). He was promoted to the P-5 level, as a Senior Recruitment Officer, with effect from 1 April 1980 and on 1 May 1984, his functional title became Chief of Unit. The Applicant separated from the service of the United Nations on 1 May 1992.

On 24 August 1989, the then Chief of Technical Assistance Recruitment and Administration Service (TARAS), authorized the Applicant to travel to Moscow, for three days, on an official mission, in combination with home leave travel. The visit to Moscow did not materialize, as the entry visa arrived too late.

On 15 April 1991, the Applicant wrote to the Executive Officer of DTCD, through the new Chief of TARAS, asking that, in connection with his home leave travel to Rome, his postponed mission to Moscow be authorized and requesting that his "travel authorization be processed accordingly."

In the absence of the Director, Programme Support Division, DTCD, the Applicant obtained from the new Chief of TARAS, endorsement of his travel to Moscow. A travel authorization was issued on 1 June 1991. The "Purpose of Travel" was stated as "1991 Home leave travel to Rome, ... combined with stopover for 3 days in USSR to hold discussions with the National Recruitment Service regarding participation of candidates in the technical assistance programme."

When the Director, Programme Support Division, DTCD, learned of the Applicant's plans, he indicated, in a note dated 21 June 1991, to the Chief of TARAS, that he would not approve the additional funds required for the Applicant's three-day stay in Moscow. On 25 June 1991, in a memorandum purportedly copied to the Applicant, he requested the Acting Executive Officer of DTCD to amend the Applicant's travel authorization form. This was done on the same day. The new Travel Authorization stated that its purpose was "To cancel official stopover for 3 days in Moscow combined with Home leave travel ... decrease funds ... $663 accordingly and change of departure and return dates." According to the Applicant, on 25 June 1991, when he picked up his ticket, he was informed by the UN Travel Agency that the Executive Office had amended his Travel Authorization and cancelled the portion of his trip to the Soviet Union.

Nevertheless, the Applicant departed Headquarters on authorized home leave travel to Rome on 27 June 1991. His ticket included a stay-over in Moscow, that portion of the trip having been paid for out of his own pocket. In Moscow, he met with government officials to discuss the participation of Soviet national experts - particularly in natural resources - in the UN programme of technical assistance.

On 19 August 1991, he wrote to the Under-Secretary-General, DTCD, attaching a report on his mission.

On 11 September 1991, the Applicant filed a claim for reimbursement for the portion of the ticket for which he had paid (US$575.00) and daily subsistence allowance for three days in Moscow

and Leningrad (US$615.00). On 17 September 1991, this request was denied.

On 13 November 1991, the Applicant requested the Secretary-General to review that administrative decision. On 18 December 1991, he lodged an appeal with the Joint Appeals Board (JAB), alleging that the cancellation of his trip to the Soviet Union had been initiated by the Director, Programme Support Division, DTCD, out of revenge for prior disagreements.

On 4 October 1991, the Under-Secretary-General, DTCD, had reported to the Assistant Secretary-General, OHPM, the Applicant's travel to the Soviet Union, in disregard of departmental instructions, as a case of possible misconduct.

An investigation was held. In a letter to the Applicant, dated 12 February 1992, the Director, Staff Administration and Training Division, OHRM, stated inter alia:

> "5. Regardless of what you might have thought the reason was [for the cancellation of the trip], the fact is that you then proceeded with your plans, fully knowing that you had no travel authorization to go to Moscow.
>
> 6. You actually left New York for Moscow on Thursday, 27 June 1991, in the evening. I therefore do not share your view that the time between the issuance of your air travel ticket and your departure did not allow you to seek clarification on the matter, when, as you concede, you had ample reason to do so.
>
> 7. After a review of all the circumstances, ... , the Assistant Secretary-General, Human Resources Management, has decided that the case should be closed in accordance with administrative instruction ST/AI/371 of 2 August 1991. It remains, however, that you engaged in travel which was not properly authorized, and adopted a course of conduct having serious implications for the Organization without prior discussion with your superiors. You were remiss in doing so."

The JAB adopted its report on 26 May 1992. The considerations and recommendations of the majority of the Panel read as follows:

"...

21. The Panel agreed that the methods of communication between the Director and the Appellant in connection with the revocation of the travel authorization was unsatisfactory. The Director never communicated with Appellant directly nor did he clearly indicate to the Acting Director, who had endorsed the travel request on the understanding that it was authorized, that it was not. His memorandum to the latter dealt only with the additional costs of the trip which he was not prepared to approve (...).

22. There would have been enough time before the Appellant went to pick up his tickets to make it clear to him that what was involved was not only the expenditure but the trip itself to which the Director was opposed at that time for reasons other than financial. In the light of this failure by the Administration to make its views on his intended trip to the USSR clear and unambiguously known to the Appellant, it was not surprising that the Appellant should have been left in some doubt on this crucial point.

23. However, the majority of the Panel felt that, nevertheless, once the Appellant had been informed that his travel authorization had been amended and the portion for travel to the USSR had been cancelled, he was under notice that he could no longer assume that he had such authorization, convinced though he might have been that he should have it. It was incumbent upon him to seek clarification from his supervisor at that point. Although the time left for doing so before his intended departure was short - two days - it was sufficient to allow him to do so.

24. In the view of the majority, an experienced staff member of Appellant's rank with twenty years' experience in the service should have known that he lacked the authority to decide on his own to undertake the travel at issue. The amended travel authorization showed that his superiors did not want him to undertake it. While he may have questioned the justification for their decision, he could not ignore that decision except at his own risk.

25. Regrettable though it be that no clarification of the reasons for the decision was given, it was incumbent on the Appellant to seek it if he was in doubt, however little time there might have been left. Staff members cannot assume that they can make decisions on their own regarding travel at the expense of the Organization, without the authorization of their superiors.

> 26. While the majority regret that in this case this results in the staff member having incurred expenses for which he is not entitled to be reimbursed, for the reasons stated above, it recommends that the appeal be rejected.
>
> 27. At the same time, the majority wishes to draw to the attention of the Administration that Appellant was informed only at the last moment of the cancellation of what he believed to be an authorized mission. It recommends that steps be taken to avoid such delays in future."

In a dissenting opinion, one member of the JAB recommended that the Applicant be reimbursed his "per diem and additional costs on his ticket for the mission" on the ground that "the notice cancelling the mission ... came from unconventional sources - the Travel Agency. ... not known to be officially linked with the United Nations Administration for purposes of transmitting official messages between the United Nations Administration and United Nations staff." Furthermore, "The act which [the Applicant] committed not only caused no pecuniary or political harm to the UN, but was, in fact, of international benefit to the Organization."

On 16 June 1992, the Assistant Secretary-General for Human Resources Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "The Secretary-General has re-examined your case in the light of the Board's report. He regrets that you were not informed of the decision not to allow you to proceed to Moscow on official travel in conjunction with your home leave as soon as that decision had been taken. However, the Secretary-General agrees with the conclusion reached by the majority of the Panel that, before you decided to proceed to Moscow, you were nonetheless on notice that the travel authorization had been cancelled. Accordingly, he has decided to accept the Board's recommendation that your appeal be rejected."

On 25 January 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's travel had been duly authorized by the Chief of TARAS.

2. The Applicant acted in good faith and did not intend to substitute his own judgement for that of his supervisors.

3. The decision of the Director, Programme Support Division, DTCD, to cancel the trip was based on personal reasons, contrary to the interests of the United Nations.

Whereas the Respondent's principal contentions are:

1. The Applicant's trip to the Soviet Union was not authorized, and, therefore, expenses incurred by him are not reimbursable.

2. The decision to cancel the Applicant's trip was not vitiated by prejudice or other improper motives.

The Tribunal, having deliberated from 30 June to 13 July 1994, now pronounces the following judgement:

I. The Applicant claims that the mission had been authorized and that his actions were in good faith. Staff rule 107.6 specifies:

> "Before travel is undertaken it shall be authorized in writing. In exceptional cases, staff members may be authorized to travel on oral orders, but such oral authorization shall require written confirmation. A staff member shall be personally responsible for ascertaining that he or she has the proper authorization before commencing travel."

II. This rule clearly establishes that the onus was on the Applicant to determine whether he was authorized to travel. According to the Applicant, he did request and subsequently obtained the authorization to travel to the Soviet Union for three days in connection with home leave.

III. It is not in dispute that a few weeks prior to the Applicant's departure there was confusion regarding his travel entitlements. Then, two days before his departure, the Applicant was informed at the UN Travel Agency of the cancellation of his trip to the Soviet Union. It is conceivable that the Applicant believed that the cancellation of his mission was caused by another administrative misunderstanding rather than a decision by his supervisors. Nevertheless, the Respondent claims that the Applicant departed fully aware that the trip was unauthorized and that therefore his request for reimbursement should be rejected. The Tribunal has some difficulty in fully accepting this contention as it believes that this regrettable confusion was partly the fault of the Respondent.

IV. The Respondent failed in his responsibility to take diligent and reasonable steps to communicate to the Applicant that the mission had been cancelled. The Tribunal notes that in a communication dated 25 June 1991, the Director, Programme Support division, DTCD, asked the Acting Executive Officer, DTCD, to amend the Applicant's Travel Authorization to cancel the portion of travel to the Soviet Union. A copy of this communication was apparently sent to the Applicant but he alleges he never received it. This allegation has not been disputed by the Respondent.

The Tribunal notes that the Administration used poor judgement when it left it to the Travel Agency to convey to the Applicant that his travel authorization had been changed. The lack of direct communication was underscored by the JAB in its report, as follows:

> "At the same time, the majority wishes to draw to the attention of the Administration that [the Applicant] was informed only at the last moment of the cancellation of what he believed to be an authorized mission. It recommends that steps be taken to avoid such delays in future."

The JAB report also included a dissenting opinion by one of the members, which stated:

> "There is no showing that either the Director or someone in DTCD's Executive Office did, in fact, take any reasonably diligent steps to notify [the Applicant] of the cancellation. [The Applicant] was physically located in close proximity to either office. Common sense suggests that the very urgency of the matter should have dictated a necessity for full, effective steps aimed at stopping [the Applicant] from proceeding on to Moscow. Common sense was never followed in this case because DTCD preferred to leapfrog [the Applicant] in preference for the Travel Agency. This is a case of instructions not being direct and/or clear, a fault that does not reside in the staff member, but in the Administration."

In addition, the Secretary-General, in accepting the recommendation of the JAB, included the following statement in his letter conveying his decision:

> "The Secretary-General ... regrets that you were not informed of the decision not to allow you to proceed to Moscow on official travel in conjunction with your home leave as soon as that decision had been taken."

V. The Tribunal trusts that the Applicant was in good faith when he departed. He was acutely aware that this mission to the Soviet Union had been planned and cancelled twice in the past at the last minute. Believing some administrative misunderstanding had occurred, he paid the travel costs in order to avoid another embarrassing cancellation.

Nevertheless, the Applicant did have two days to verify with his supervisors whether the problem was administrative or whether in fact the original Travel Authorization had been cancelled. This omission, however regrettable, does not, in the Tribunal's view, detract from the Applicant's good faith.

VI. The Applicant also contends that he is entitled to reimbursement of his travel expenses on the basis of the general legal principle of the prohibition of unjust enrichment.

The doctrine of unjust enrichment is defined in Black's Law Dictionary (4th Edition, p. 1705) as:

> "[The] doctrine that a person shall not be allowed to profit or enrich himself inequitably at another's expense."

VII. As a direct result of the work performed by the Applicant during his mission to the Soviet Union in 1991, the Administration reaped international benefit. It led to the receipt by TARAS of candidacies of Russian specialists in the technical field. Thus, the Respondent implicitly ratified the Applicant's mission by actively partaking in discussions with the Soviet Union concerning these candidates.

VIII. Had the Respondent been steadfast in his assertion that the Applicant "misrepresent[ed] his presence as being on official UN business" and rejected the product of the Applicant's undertaking in the Soviet Union, then it could be argued that he did not gain from it. The Tribunal agrees with the dissenting opinion of the JAB which reads as follows:

> "7. ... The opinion here is that, given good faith intentions, [the Applicant's] acts could have been easily ironed out through the act of ratification. The act which [the Applicant] committed not only caused no pecuniary or political harm to the UN, but was, in fact, of international benefit to the Organization. It led to the realization of the very objectives which the UN had been striving to attain since 1989, namely the involvement of Russian experts in UN sponsored projects.
>
> 8. Why could the UN then not ratify, or affirm [the Applicant's] act, which had resulted in some benefit to the UN? The continued interaction between the DTCD and the Russians following closely upon [the Applicant's] mission would strongly suggest that [the Applicant's] act was done in the best interest of the UN, and in accordance with the objectives and directives of DTCD."

IX. Although the Administration refused to pay the Applicant's travel expenses, it has nevertheless benefitted from the fruit of the Applicant's work. In this respect, the Tribunal concludes that there has been an inequitable enrichment on the Respondent's part. The Tribunal concurs with the dissenting opinion of the JAB:

"Fairness and justice demands reimbursement of [the Applicant's] per diem and additional costs on his tickets for the mission."

The Applicant is therefore, entitled to be reimbursed his expenses of US$1,190.00.

X. Regarding the Applicant's claims for compensation for damages to his reputation due to the request for disciplinary measures against him, the Tribunal agrees with the Respondent's submission that the Applicant has failed to discharge the burden of proving improper motives in cancelling his mission to the Soviet Union.

XI. The disciplinary action was suggested in October 1991 and in February 1992, the Assistant Secretary-General for Human Resources Management closed the case as not warranting any disciplinary action. The Applicant did not substantially demonstrate that he in fact suffered any damages in so short a time period.

XII. In view of the foregoing, the Tribunal concludes from the record that the Applicant obtained the requisite authorization and that he was in good faith when he undertook his mission to the Soviet Union. Nevertheless, the Tribunal recognizes that both the Applicant and the Respondent failed in duly communicating with one another. This course of action resulted in this unfortunate case.

XIII. The Tribunal stresses that this case should be treated as a "cas d'espèce", as it is incumbent upon staff members to ensure that they have been authorized to travel before undertaking any mission on behalf of the Organization.

XIV. The Tribunal rejects the Applicant's claim for compensation for the damage to his reputation as he has failed to provide evidence thereof.

XV. For the foregoing reasons the Tribunal orders the Respondent to pay to the Applicant the amount of US$1,190.00, corresponding to his travel expenses.

(Signatures)

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

Geneva, 13 July 1994

R. Maria VICIEN MILBURN
Executive Secretary

STATEMENT BY MR. LUIS DE POSADAS MONTERO

I agree with the above judgement only on the grounds set forth in paragraphs VI to XI.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Geneva, 13 July 1994

R. Maria VICIEN MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/639
13 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 639

Case No. 693: LEUNG-KI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas at the request of Fat-Chun Leung-Ki, a staff member of the United Nations Conference on Trade and Development, hereinafter referred to as UNCTAD, the President of the Tribunal, with the agreement of the Respondent, extended to 30 September 1992 the time-limit for the filing of an application to the Tribunal;

Whereas, on 29 August 1992, the Applicant filed an application requesting the Tribunal, inter alia:

"...

(d) To examine [whether] the methods of restructuring of the Commodities Division in UNCTAD (particularly, in the instance of this case, by an Officer-in-Charge recently transferred from another Division) ... damaged career prospects of staff members such as the Applicant...

(e) To examine [whether] ..., the Officer-in-Charge of the Commodities Division (who was subsequently removed) has a deep-seated prejudice against staff members of certain racial backgrounds...

(f) To declare that [the Officer-in-Charge of the Commodities Division's] assessment of the Applicant's supervisory ability was tainted with prejudice and was done without consultation with his immediate supervisor.

(g) To declare that the aforesaid assessment has inflicted great moral and psychological torments on the Applicant and his family, ... contributing to the deterioration of his health...

(h) To compensate the Applicant, at least partly, for the medical and surgical costs, as well as to reimburse the United Nations ... for ... the costs borne by it.

(i) To restore the Applicant's prospects for career development and that his promotion should be favourably considered if recommended by his supervisors."

Whereas the Respondent filed his answer on 26 February 1993;

Whereas, on 22 June 1994, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 23 May 1974, as an Associate Economic Affairs Officer at the P-2, step 1 level, in the United Nations Economic Commission for Africa, at Addis Ababa. On 1 February 1975, he was granted a probationary appointment and on 1 March 1976, a permanent appointment. The Applicant was promoted to the P-3 level, with effect from 1 April 1977. On 1 April 1978, he was transferred to UNCTAD in Geneva, as an Economic Affairs Officer in the Minerals and Metals Branch of the Commodities Division. He was promoted to the P-4 level, with effect from 1 April 1981.

In a memorandum dated 29 January 1988, the Secretary-General of UNCTAD announced to the staff that a reorganization would be conducted within the UNCTAD Secretariat. On 1 February 1988, the Officer-in-Charge of the Commodities Division (who had recently been transferred from another division) invited staff members of the Division to submit their views on the reorganization. On 9 March 1988, the Secretary-General of UNCTAD held a general meeting for UNCTAD staff, to explain the principal aims of the reorganization.

In a communication dated 20 May 1988, the Secretary-General of UNCTAD announced to the staff his plan for the reorganization of

the Secretariat, the "main decisions on reorganization" and "how and when they are to be implemented". Section III of that communication explained the new structure of the Commodities Division where the Applicant worked. According to the record, on 15 June 1988, the Officer-in-Charge met with the staff to discuss the reorganization and on 22 June 1988, the Applicant met with the Director of Programme Support and Management Services concerning his career development prospects in light of the forthcoming reorganization of the Commodities Division.

On 30 June 1988, the Officer-in-Charge of the Commodities Division informed all its staff of "the new structure of the Division, as approved by the Secretary-General ... as shown in the attached chart". According to the chart, the Applicant had not been appointed Chief of Section (Officer-in-Charge) of the Ferrous Minerals and Metals Section.

On 12 December 1988, the Applicant requested the Secretary-General of the United Nations to review the administrative decision not to appoint him Officer-in-Charge of the Ferrous Minerals and Metals Section.

In a reply dated 25 April 1989, the Assistant Secretary-General for Human Resources Management informed the Applicant that the Secretary-General had decided to maintain the decision. He stated, inter alia,that "staff members are subject to assignment by the Secretary-General to any of the activities or offices of the United Nations and, consequently, do not have a right to any particular post or assignment. ... The decision not to designate [the Applicant] Officer-in-charge of the Ferrous Minerals and Metals Section was, therefore, within the authority of the Secretary-General of UNCTAD... as there is no evidence to substantiate ... that his decision not to appoint [the Applicant] Officer-in-charge ... resulted from prejudice...".

On 27 June 1989, the Applicant lodged an appeal with the Geneva Joint Appeals Board (JAB). The JAB adopted its report on 6 February 1992. Its conclusions and recommendations read, in part, as follows:

"Conclusions and recommendations

38. ...the Panel unanimously:

(b) Concludes that the restructuring of UNCTAD was carried out within the discretionary authority of the UNCTAD Secretary-General;

(c) Further concludes that adequate consultation took place in this respect;

(d) Finally, concludes that the Appellant was unable to substantiate his claim that the contested decision was vitiated by prejudice and other extraneous factors.

39. Accordingly, the Panel makes no recommendation in support of the appeal."

On 20 February 1992, the Director, Office of the Under-Secretary-General for Administration and Management, transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "The Secretary-General has re-examined your case in the light of the Board's report. He fully shares the Board's conclusions and has therefore decided, in accordance with its recommendation, not to accept your appeal."

On 29 August 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The JAB erred in concluding that adequate consultation took place at the Applicant's level and that the Applicant had not substantiated that the decision was vitiated by prejudice and other extraneous factors.

2. The methodology used to restructure the Commodities Division overlooked relevant General Assembly resolutions and disregarded administrative instructions.

3. The Officer-in-Charge of the Commodities Division was prejudiced against those with certain racial backgrounds, which affected his assessment of the Applicant's supervisory ability.

Whereas the Respondent's principal contentions are:

1. The reorganization fell within the discretionary powers of the Respondent, and would be open to challenge only if tainted with prejudice or improper motive.

2. The selection of staff for a particular post is the exercise of a discretionary power by the Respondent and can be challenged only if it is tainted with prejudice or improper motive.

3. Staff members have no right to be assigned to any specific post.

4. The Applicant's claim of prejudice is not supported by any credible evidence.

The Tribunal, having deliberated from 21 June to 13 July 1994, now pronounces the following judgement:

I. The Applicant's principal contention is that the proper method for restructuring the Commodities Division was not followed, as the Secretary-General of UNCTAD failed to apply the guidelines established by the relevant General Assembly resolutions and by administrative instructions. Therefore, the Tribunal must examine, in the first place, whether UNCTAD followed proper procedures, as stipulated in the relevant documents.

II. The Applicant refers to certain documents dealing with the reorganization of UNCTAD, claiming that the Respondent did not follow directives found therein when he restructured the Commodities Division. These documents are:

- The Secretary-General's bulletin ST/SGB/150/Rev.1, dated 1 June 1977, entitled "Changes in the Functions and Organization of Secretariat Units".

- Administrative instruction ST/AI/338, dated 22 December 1986, entitled "Vacancy Management and Staff Redeployment".

- General Assembly resolution 43/224/A, dated 21 December 1988, entitled "Personnel Questions".

III. As indicated in a memorandum dated 20 May 1988, from the Secretary-General of UNCTAD, implementation of the reorganization was to proceed in conformity with the administrative and management procedures set out in ST/SGB/150/Rev.1. This memorandum also indicated that arrangements at the Division and Programme level would be carried out "on the basis of recommendations emerging from consultative processes ... which will permit staff members to express their views on issues of concern to them."

In the Tribunal's view, this directive was followed and consultations took place on several occasions.

IV. By memorandum dated 1 February 1988, staff members were invited to submit their views on the restructuring of the Division. The then Officer-in-Charge of the Division also met with each staff member individually to seek his or her views.

In March, the Secretary-General of UNCTAD invited all staff members to a meeting to discuss the reorganization plan. He replied to questions put to him. In May 1988, the Deputy-Director of the Commodities Division discussed, with the staff, the proposed reorganization and assignments. Although the Applicant was absent during this time, the Tribunal is not convinced that his absence caused him any harm, as the discussions held during this time do not appear to have been conclusive. As stated by the Secretary-General of UNCTAD in the 20 May memorandum, the internal structure of the Commodities Division was to be determined, after further consultations. These consultations took place on 15 June 1988, when the then Officer-in-Charge outlined a proposal for reorganization to the staff.

V. The Applicant also consulted the Director of Programme Support and Management Services and the Secretary-General of UNCTAD, regarding the effect of the reorganization proposal on his

career prospects. Following this last meeting, the Applicant met once again with the then Officer-in-Charge to discuss the matter.

In light of the above, the Tribunal is satisfied that appropriate consultations were held with the staff regarding the reorganization of the Commodities Division, in conformity with the Secretary-General's Bulletin ST/SGB/150/Rev.1.

VI. The Tribunal agrees with the JAB's view that administrative instruction ST/AI/338 , on Vacancy Management and Staff Redeployment, was not violated in the present case because the reorganization of the Commodities Division did not result in the availability of a vacant post of Chief of Section for which the Applicant might have applied. The Chief of the Division reassigned another staff member, which he was entitled to do, according to paragraph 3 of the above-mentioned instruction.

VII. As the JAB noted, General Assembly resolution 43/224/A was adopted after the reorganization of UNCTAD and after the submission of the Applicant's request for review of the decision not to appoint him Chief of Section. This General Assembly resolution cannot therefore be applied to his case.

VIII. Nevertheless, as requested by the Applicant, the Tribunal has reviewed General Assembly resolution 43/224/A. It calls inter alia for the need to maintain the principle of equitable geographical distribution in the upper echelons of the Secretariat, and for improved representation of developing countries at senior levels. It underscores the importance of a geographically balanced international civil service. The Applicant claims that the reorganization of the Commodities Division did not conform to these criteria. The Tribunal is unable to find anything in the documentation to support the Applicant's claim.

IX. The Applicant's second contention is that due to discrimination or prejudice on the part of the Officer-in-Charge of

the Commodities Division, he was bypassed in the selection process for the post of Officer-in-Charge of the Ferrous Minerals and Metals Section.

The Applicant claims that the Officer-in-Charge of the Commodities Division had a deeply-seated prejudice against staff members of certain racial background. However, the evidence put forward does not support his claim. On the contrary, the Applicant himself wrote in his rebuttal letter of 29 December 1989, that he "always had cordial working relations" with the Officer-in-Charge. In addition, it is inferred from this letter that the Applicant believed that the Officer-in-Charge was acting in good faith and did not seem to hold a personal bias when he re-organized the Division. In fact, the Applicant believes that other constraints seem to have motivated his decision. His letter states inter alia:

> "From the situation which [the Officer-in-Charge] explained to me, there was no question of supervisory ability as a factor in his decision for not recommending me for a supervisory assignment. On the contrary, I was given to understand that he faced a number of constraints, including pressure from outside the Commodities Division, and he also said that I should wait."

X. In claims of prejudice or discrimination, the burden of proof is on the party alleging it. Hence, in order to succeed, the Applicant must prove the existence of prejudice or discrimination. Unless the Applicant can demonstrate that the reorganization was tainted by prejudice or some other improper motive, the reorganization of an office falls within the discretionary powers of the Administration. The Tribunal will not examine whether a given office should be organized in any particular way or whether better results would be obtained if a reorganization took or failed to take place. (Cf. Judgement No. 117, Van der Valk (1968), Judgement No. 350, Raj (1985) and Judgement No. 412, Gross (1988)).

XI. The only document produced by the Applicant, in support of his claim of discrimination, is a chart entitled "Patterns of

promotion in the UNCTAD Secretariat at the P-5 level, 1973-1984". The relevance of this document is unclear. It does not show that the Applicant suffered discrimination in the context of the restructuring.

XII. The Applicant further contends that due to the restructuring of the Commodities Division, his career prospects have been damaged. However, in its Judgement No. 350, Raj (1985), the Tribunal held that "the mere fact that a reorganization may hinder the prospects or in any way affect the career of a staff member does not necessarily point to the existence of discrimination or improper motives in the Administration and thus, does not in itself give grounds for any claim against the decision taken." The Tribunal emphasizes that the evaluation and selection of a staff member for a particular post rests within the discretionary authority of the Secretary-General and that such a decision can be challenged only on the grounds of prejudice or improper motive (Judgement No. 312, Roberts (1983)).

XIII. The Applicant has asked the Tribunal to look for the motivation behind the selection of the Chief of Section. The Applicant does not dispute the Officer-in-Charge's discretionary authority to reassign staff within the division for which he is responsible. What he claims is that this discretion is not absolute. The Tribunal notes in this regard that the Officer-in-Charge's discretion was not absolute. He had to abide by certain rules of fairness and administrative procedures before he was able to make his decisions. As is pointed out by C.F. Amerasinghe in The Law of the International Civil Service (Vol. I, pp. 357-358):

> "What all discretionary decisions have in common is that a 'fair' procedure or 'due process' be followed when they are taken, fairness or the appropriateness of process being relative to the nature of the decision taken."

XIV. The Applicant has the onus of proving that he was not selected Officer-in-Charge of his section due to extraneous factors, such as prejudice, improper motive or discrimination. He did not provide sufficient proof to discharge that onus. Therefore, this claim must also fail.

XV. With respect to the Applicant's claim for compensation for a service-incurred medical condition, he must turn to the Advisory Board on Compensation Claims. The Tribunal is not the proper forum to deal with such a claim at this stage.

XVI. The Tribunal concludes that the reorganization of the Commodities Division, as well as the decision not to assign the Applicant as Officer-in-Charge of the Ferrous Minerals and Metals Section, were not tainted with prejudice or other improper motive. The Tribunal finds that the claim for compensation for a service-incurred injury is not properly before the Tribunal.

XVII. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

Geneva, 13 July 1994

B. Maria VICIEN MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/640
13 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 640

Case No. 728: MOURAD

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas at the request of Mohamed Jalal Mourad, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 April and 31 July 1993 the time-limit for the filing of an application to the Tribunal;

Whereas, on 3 May 1993, the Applicant filed an application requesting, inter alia:

"...

(a) That the Tribunal consider the amendment reflected in (P-5) Personnel Action No. E9W-495, issued on 10 September 1989 (...), as null and void, since it purported to implement unauthorized changes in the contractual relationship between the Administration and the Applicant...

(b) That the Tribunal consider the 'temporary repatriation' of the Applicant effective August 1990 as null and void...

(c) That the Tribunal consider the separation of the Applicant as having been based on an arbitrary and capricious decision...

...

(e) That the Tribunal order that the decision to separate the Applicant be rescinded and that he be reinstated in his previous post retroactively to the date of separation;

(f) Alternatively that adequate compensation be ordered for the injury sustained by the Applicant of not less than two years' net base salary, bearing in mind what the Administration would have had to pay as contribution to the Pension Fund for the period in question."

Whereas the Respondent filed his answer on 10 November 1993;

Whereas the Applicant filed written observations on 21 November 1993;

Whereas, on 7 December 1993, the Respondent submitted a document requested by the Applicant;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 August 1988, as an Economic Affairs Officer under a six-month fixed-term appointment at the P-4, step 1 level in the Natural Resources/Science and Technology Division of the Economic and Social Commission for Western Asia (ESCWA) in Baghdad, Iraq. Upon the recommendation of the Appointment and Promotion Board, and after approval by the Secretary-General, the Deputy Director, Recruitment and Placement Division, Office of Human Resources Management, by cable dated 9 March 1989, authorized ESCWA to offer the Applicant a two-year fixed-term appointment at the P-4, step 6 level.

A Personnel Action form was issued on 12 March 1989, by ESCWA, implementing an extension of the Applicant's appointment for two years, through 31 January 1991. The Applicant, on 12 March 1989, signed a letter of appointment for a fixed-term of two years, through January 1991. On 10 September 1989, ESCWA issued a new Personnel Action form, amending the Personnel Action form of 12 March 1989, "to reflect correct duration of appointment to read one year and six months", through 31 July 1990 and not 31 January 1991. The Applicant, on 21 September 1989, signed a new letter of appointment for a fixed-term of one and a half year, through 31 July

1990. The Applicant's appointment was then extended for a further fixed term period of one year, through 31 July 1991.

In a memorandum dated 12 June 1991, the Chief, Division of Administration, asked the Executive Secretary whether the Applicant's appointment should be extended beyond 31 July 1991. On 13 June, the Executive Secretary, in a handwritten answer, stated: "take necessary arrangements for no extension."

During the evacuation of ESCWA staff from Baghdad, as a result of the Persian Gulf crisis, the Applicant was repatriated to Damascus, in August 1990. He remained in Damascus until the expiration of his contract on 31 July 1991.

On 28 July 1991, UNDP Damascus was asked by the Acting Chief of Personnel, ESCWA, to inform the Applicant that he was not among the ESCWA international staff requested to report for duty in Amman since his fixed-term appointment expired on 31 July 1991.

On 7 August 1991, the Applicant requested the Secretary-General to review the administrative decision not to extend his appointment. Not having received a substantive reply, on 9 December 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 22 October 1992. The conclusions and recommendations of the majority of the Panel read as follows:

> "18. The majority of the Panel concluded that the decision not to renew the Appellant's contract did not violate his rights, including his right to due process.
>
> 19. The majority of the Panel also concluded that, under the terms and conditions of the Appellant's employment, he had no right to the renewal of his appointment and that he was not given any reasonable expectancy of continued employment by the Organization.
>
> 20. However, the majority of the Panel took into consideration the fact that other staff members serving in ESCWA who had their contracts extended, were authorized by ESCWA to go to Baghdad to retrieve their personal effects. The majority of the Panel, therefore, recommends that the Appellant be paid compensation, equal to his salary, covering the period from 1 August 1991 through the date of his return

to Syria from Baghdad, where he had gone to retrieve his personal effects, and that, in all other aspects, the appeal be rejected."

In a dissenting opinion, dated 19 October 1992, a member of the Panel concluded:

"...

8. In view of the series of inconsistencies and evasive replies [by the Administration], I cannot but conclude that indeed the Appellant had a legal expectancy of continuing service, that he did not receive the fullest regard for renewal of his fixed-term appointment beyond July 1991, and that, consequently, the decision to terminate him was vitiated by prejudice, improper motives and extraneous considerations."

On 23 November 1992, the Director of Personnel transmitted to the Applicant a copy of the Board's report and informed him as follows:

"The Secretary-General has examined your case in the light of the Board's report, including the dissenting opinion. He concurs with the majority conclusion that you had no right to the renewal of your appointment and that you had not been given any reasonable expectancy of continued employment by the Organization.

Although, under your terms of appointment, your contract expired automatically and without prior notice on the expiration date specified in your letter of appointment, the Secretary-General finds that, under the exceptional circumstances of your case, you should have been informed in advance of the Administration's intention not to renew your contract. Accordingly, the Secretary-General has decided that you should be paid compensation in lieu of the one month notice period which would have been appropriate under the circumstances."

On 3 May 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision to separate him was "arbitrary and capricious", and, therefore, he should be reinstated in his post, or paid adequate compensation.

2. The Applicant's second fixed-term appointment constituted an arbitrary substitute for the existing fixed-term appointment, which he had been given pursuant to a recommendation by the Appointment and Promotion Board and which had been approved by the Secretary-General.

3. A new staff member, especially in a regional office, should not have to suspect that a document he is asked to sign by the Respondent is invalid and would prejudice his entitlements and rights.

Whereas the Respondent's principal contentions are:

1. The Applicant had no legal expectancy to renewal of his fixed-term appointment.

2. The decision not to renew the Applicant's appointment was not vitiated by improper motives.

3. The Applicant has been granted adequate compensation for not being informed in advance of the non-renewal of his appointment.

The Tribunal, having deliberated from 24 June to 13 July 1994, now pronounces the following judgement:

I. The Tribunal must first examine the shortening of the original two-year fixed-term appointment, starting on 1 February 1989 and ending on 31 January 1991. The Respondent sought to curtail this apparent two-year appointment by six months.

II. There was an initial appointment for six months, starting on 1 August 1988 and expiring on 31 January 1989. A letter of 26 October 1988, from the Chief, Division of Administration, ESCWA,

Baghdad, to the Chairman of the Appointment and Promotion Committee, has as its subject "two years fixed-term appointment". The letter refers to eight applications for the post. In another letter of 1 February 1989, i.e. the day after the first contract had come to an end, the Chairman of the Appointment and Promotion Board recommended to the Appointment and Promotion Committee that the Applicant be given a two-year fixed-term appointment.

III. On 23 February 1989, the Appointment and Promotion Board recommended the Applicant for a two-year fixed-term appointment. The Personnel Action form, dated 12 March 1989, notes the effective date as 1 February 1989 and it mentions the extension of the fixed-term appointment for a two-year period. Nevertheless, another Personnel Action form, dated 10 September 1989, purports to amend the two-year period to one year and six months, leaving the effective starting date still as 1 February 1989.

IV. The Applicant asks that this amendment be found null and void since it sought to implement unauthorized changes in the contractual relationship between the parties. The Respondent says that the first appointment for a six-month period was made in anticipation of the expected approval by the Secretary-General of a two-year appointment, on the recommendation of the Appointment and Promotion bodies. When the approval was received, the Personnel Action form dated 12 March 1989, erroneously reflected, according to the Respondent, an extension of two years instead of eighteen months, which would have taken into account the six months already served. The Personnel Action form dated 10 September 1989, was a correction of this technical error. The Respondent also refers to the Applicant's signing the letter of appointment dated 21 September 1989, accepting a fixed-term contract of 18 months.

V. The Tribunal cannot accept the Respondent's explanation that it was initially intended that the first period of six months was to form part of a two-year appointment to have commenced on

1 August 1988. Nor can the Tribunal accept that the commencement date was to have been 1st February 1989 and that the appointment was to have been for eighteen months.

VI. If this were the case, the question must be raised as to why eight applicants were still being considered for the post in October 1988, after, according to the Respondent's argument, the term of the appointment had, in effect, already begun.

Moreover, if the appointment were to be taken as genuinely an eighteen-month appointment, it is strange that every letter and document, with the exception of the Personnel Action form dated 10 September 1989, mentions a two-year appointment in a context that can only reasonably be interpreted as referring to the future.

VII. The fact that the Applicant signed a letter of appointment referring to the eighteen-month extension is overwhelmed by an abundance of evidence which suggests that this shorter term was not initially intended. It is obvious to the Tribunal that the Applicant, as an employee, must have perceived himself to have been in the weaker position vis a vis his employer. Also, the Applicant must have harboured hopes for his future with the Organization. The Tribunal considers that the failure of the Applicant to register a complaint at that time does not bar him from making the claim now, in the context of his separation. The difference between an eighteen-month and a two-year fixed-term contract had no apparent consequence to him at the time of the extension. The harm occurred to the Applicant at the time of his separation. The Tribunal finds, therefore, that the claim is not time-barred.

VIII. The Administration subsequently granted the Applicant his final one-year appointment. As the preceding appointment properly expired on 31 January 1991, this new appointment should have begun on 1 February 1991. The Applicant should therefore have held a fixed-term appointment through 31 January 1992.

IX. The Applicant does not argue that he had a legal expectancy of re-appointment. He asserts, however, that his separation was based on an arbitrary and capricious decision and, contrary to the Respondent's contention, was not the result of a fair and objective reorganization dictated by the exigencies of the service. The Applicant also contends that where circumstances indicate that the Administration's decision was flawed, the onus shifts to the Administration to show that the decision was fully justified.

X. The Administration has explained that its non-extension of the Applicant's appointment was dictated by the re-orientation of ESCWA programmes in Science and Technology, according to the needs of the region. It maintains that the programme required the services of an engineer rather than those of a professional economist and that, in any case, a permanent staff member was available to provide the latter.

XI. However, the Chief of the Natural Resources Science and Technology Division, under whose supervision the Applicant had worked, was of the opinion that the Applicant could easily have been retained in his own post which was redeployed. He noted that the new job description stated that the qualifications required were those of a geologist or an economist and that the Applicant fit this description.

XII. While the Tribunal is not entirely convinced by the Administration's claim that the work required an engineer in the light of the qualifications listed in the job description, it does not find this a sufficient basis for concluding that the decision was flawed. It does not erode, much less negate, the Administration's position that the decision resulted from an assessment of what a fair and objective reorganization required.

XIII. Nevertheless, the wording of the job description was such that the Applicant could well have been left with the impression

that his prospects were good, although the Administration had already made its decision not to engage an economist. To leave him with such a misleading impression caused injury to him for which he deserves compensation. The Tribunal assesses this compensation at a figure equivalent to six months of his final net base salary.

XIV. The Tribunal notes the JAB's finding that the Applicant should receive reimbursement of expenses incurred for having had to go to Baghdad to retrieve his personal effects and is in agreement with this finding. This sum has already been paid.

XV. Finally, another element of compensation arises from the curtailment of the last six months of the Applicant's two-year appointment. For this, he is entitled to six months of his final net base salary.

XVI. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant a sum equivalent to 12 months of his net base salary at the rate in effect at the time of his separation from service.

XVII. The Tribunal rejects all other pleas.

(Signatures)

Samar SEN
President

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 13 July 1994

R. Maria VICIEN MILBURN
Executive Secretary